

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

75-5013

In The
United States Court of Appeals
For the Second Circuit

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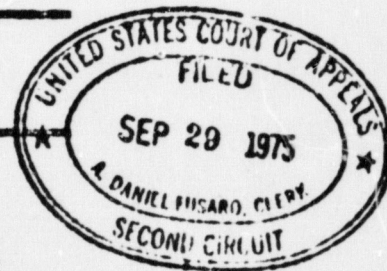
In the Matter of
of

STANNDCO DEVELOPERS, INC.

Motion of Amadori Construction Co., Inc. to modify stay of
proceedings in the New York Supreme Court, Erie County v.
Stanndco Developers, Inc. and Travelers Indemnity Com-
pany for foreclosure of mechanics lien.

Appeal from Order Denying Vacation of Stay
BK 74 282

RESPONDENT'S BRIEF



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<p>The Appellant is a member of a class. If its claim were to be paid by an indemnified surety, it would be preferred against other creditors of the same class by obtaining a greater percentage of payment than any other creditor of such class. The District Court should retain exclusive jurisdiction and ultimately determine the rights of this Appellant out of the Penfield Planned Unit Development Project equity money upon consummation of the ultimate prospective plan.</p>	
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ISSUE FOR REVIEW

Did District Court Judge Harold P. Burke properly deny the Appellant's Motion for permission to foreclose its Mechanic's Lien in State Court and continue the Stay of such Action in the Order made May 23, 1975?

STATEMENT OF THE CASE

The Appellant filed a Mechanic's Lien on the so-called Town of Penfield, Monroe County, New York, Planned Unit Development Project for an alleged balance of Eleven Thousand Five Hundred Dollars (\$11,500.00) on or about September 20, 1973.

Thereafter, on or about October 1, 1973 an Undertaking in the amount of Thirteen Thousand Dollars (\$13,000.00) was filed by the Debtor, STANNDCO DEVELOPERS, INC., with Travelers Indemnity Co. as Surety and the Lien discharged. The Lien was only discharged pursuant to the Bond with the Travelers Indemnity Co. after the Debtor, STANNDCO DEVELOPERS, INC., obtained an irrevocable Letter of Credit from the Manufacturers and Traders Trust Company, the Mortgagee on the Project, in the amount of Thirteen Thousand Dollars (\$13,000.00) by using a portion of the Mortgage monies to finance such trans-

action.

On or about November 7, 1973, the Appellant commenced an Action in Supreme Court, Erie County, New York, to foreclose its Mechanic's Lien.

On February 5, 1974, STANNDCO DEVELOPERS, INC., filed a Petition in Reorganization pursuant to Chapter X of the Bankruptcy Act. An Order of the District Court for the Western District of New York was made appointing GEORGE HOFFENBERG Trustee. The said Order contained a Stay provision preventing the continuance of any suits against the Debtor Corporation.

The Appellant made a Motion which was argued March 10, 1975 to vacate the Stay to enable it to continue its Erie County Supreme Court Lawsuit and, ultimately, resort to the Surety Bond for payment of any Judgment under which it might be entitled.

This Appellant is one of a group or class of Mechanic's Lien creditors whose claims amount to a total in excess of Five Hundred Thousand Dollars (\$500,000.00).

Since the Argument of this Motion, in District Court, and the Court's Decision or Order of May 23, 1975, denying the Appellant the relief sought, the Trustee has liquidated or sold the Debtor's interest in the Penfield Planned

Unit Development Project pursuant to formal Notice to Creditors and a Court Order dated June 13, 1975, approving the transaction whereby the Trustee is to receive the sum of One Hundred Thirty-Six Thousand Seven Hundred Ninety-Three Dollars and Forty Cents (\$136,793.40) over an approximate two (2)-year period together with an additional sum of Seventy-Five Thousand Dollars (\$75,000.00) and, accordingly, holds approximately Two Hundred Twelve Thousand Dollars (\$212,000.00), One Hundred Thirty-Six Thousand Seven Hundred Ninety-Three Dollars and Forty Cents (\$136,793.40) of which is first subject to administration expenses and, thereafter, subject to claims of all valid Mechanic's Lienors.

It is, therefore, patent that the Mechanic's Lienors as a class can look forward to a maximum payment of their respective claims of approximately Twenty Per Cent (20%).

III ARGUMENT

To grant the Appellant the relief requested would result in a preference to it in violation of the spirit and intent of the Bankruptcy Act. The Trustee argues that the District Court has exclusive jurisdiction of the assets in this Proceeding and that the Court properly used its restraining power to maintain the status quo so that, ultimately, it will be able to do equity to all creditors in their respective

classes.

Each of the Cases cited by the Appellant can be dismissed on the ground that any of the sureties, guarantors or insurance companies were not indemnified sureties. In the instant case, the Travelers Insurance Company is, to all practical intents and purposes, the alter ego of STANNDCO DEVELOPERS, INC., because, in the event it is obliged to pay any sum to the Appellant, it will immediately make itself whole by applying to the Manufacturers and Traders Trust Company pursuant to the irrevocable Letter of Credit and thus use the Bankrupt's money with the consequence of obtaining a preference as against all other creditors of the same class who supplied labor or materials to the Penfield Planned Unit Development Project.

IV

LAW

Section 111 of the Bankruptcy Act (11 U.S.C. §511) gives exclusive jurisdiction to the District Court over the debtor and his property:

" Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 115 of the Bankruptcy Act (11 U.S.C. § 515) gives the Court jurisdiction in equity:

"Upon the approval of a petition, the Court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116 (4) of the Bankruptcy Act (11 U.S.C. § 516(4)) authorizes the court to expressly stay proceedings to enforce a lien just as the Court would here by its Order of February 5, 1974:

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court-

(4) in addition to the relief provided by section 11 of this Act, enjoin or stay until final decree the commencement or continuation of a suit

against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor."

Section 148 of the Bankruptcy Act (11 U.S.C. § 548) provides for a statutory automatic stay even in the absence of the express ex parte stay as authorized by Section 116(4):

"Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."

Section 67 a. (2) of the Bankruptcy Act (11 U.S.C. § 107 a. (2)) gives an analogous argument to bolster the Trustee's position by declaring that bonded voidable liens where their surety is indemnified are not only voided but that the surety's liability is also voided as well thus keeping the debtor's assets intact and avoiding the results the Appellant seeks here:

"If any lien deemed null and void under the provisions of paragraph (1) of this subdivision a, has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any of the

non-exempt property of a person before the filing of a petition initiating a proceeding under this Act by or against him, such indemnifying transfer or lien shall also be deemed null and void: Provided, however, That if such person is not finally adjudged a bankrupt in any proceeding under this Act, and if no arrangement or plan is proposed and confirmed, such transfer or lien shall be deemed reinstated with the same effect as if it had not been nullified and voided."

Several Cases show the application of the Statutes cited above:

In re Wil-Low Cafeterias, Inc. 22 FS 522 demonstrates that the District Court had jurisdiction of a Mechanic's Lien Foreclosure Action in a Reorganization Proceeding. The Opinion reads in part as follows at Page 523:

"The property against which the lien is asserted is property of the debtor in reorganization, in custody of the bankruptcy court. The proper course therefore is to try the issue here rather than to permit the contractor to seek his remedy in the state courts."

A Case stating the Court's jurisdiction in Equity is in re Federal Facilities Realty Trust 220 F. 2d 495 reading in part at Page 499 as follows:

"...The jurisdiction, within the scope of statu-

tory authority, is paramount, exclusive, complete and unlimited.....It includes the power to divide assets equitably among creditors and to determine controversies in relation thereto.....

....."the court has power to dispose of all questions as to property in its custody, and to decide all controversies with regard thereto, and, in doing so, is endowed as a court of equity with full power to dispose of all issues raised in the course of the proceeding.
....."

....."A bankruptcy court is a court of equity....
and is guided by equitable doctrines and principles.."

Another Case which shows the purpose of maintaining status quo by exercise of the court's power to enjoin suits is in re Maier Brewing Co. 38 F Supp 806 which Opinion reads in part at Page 817 as follows:

....."In view of the foregoing, the conclusion appears to be inescapable, not only that one of the underlying purposes in revising the bankruptcy statute through the enactment of the Chandler Act was to maintain the status quo of the debtor corporation pending a reasonable opportunity to reorganize its financial structure with the consent of the statutory percentages of creditors and

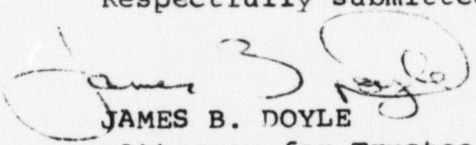
stockholders, but also that this legislation contemplated that the bankruptcy court would stay adverse action by secured, as well as unsecured, creditors until a reasonable opportunity had been afforded such debtor to submit a plan of reorganization for approval or rejection."

V

CONCLUSION

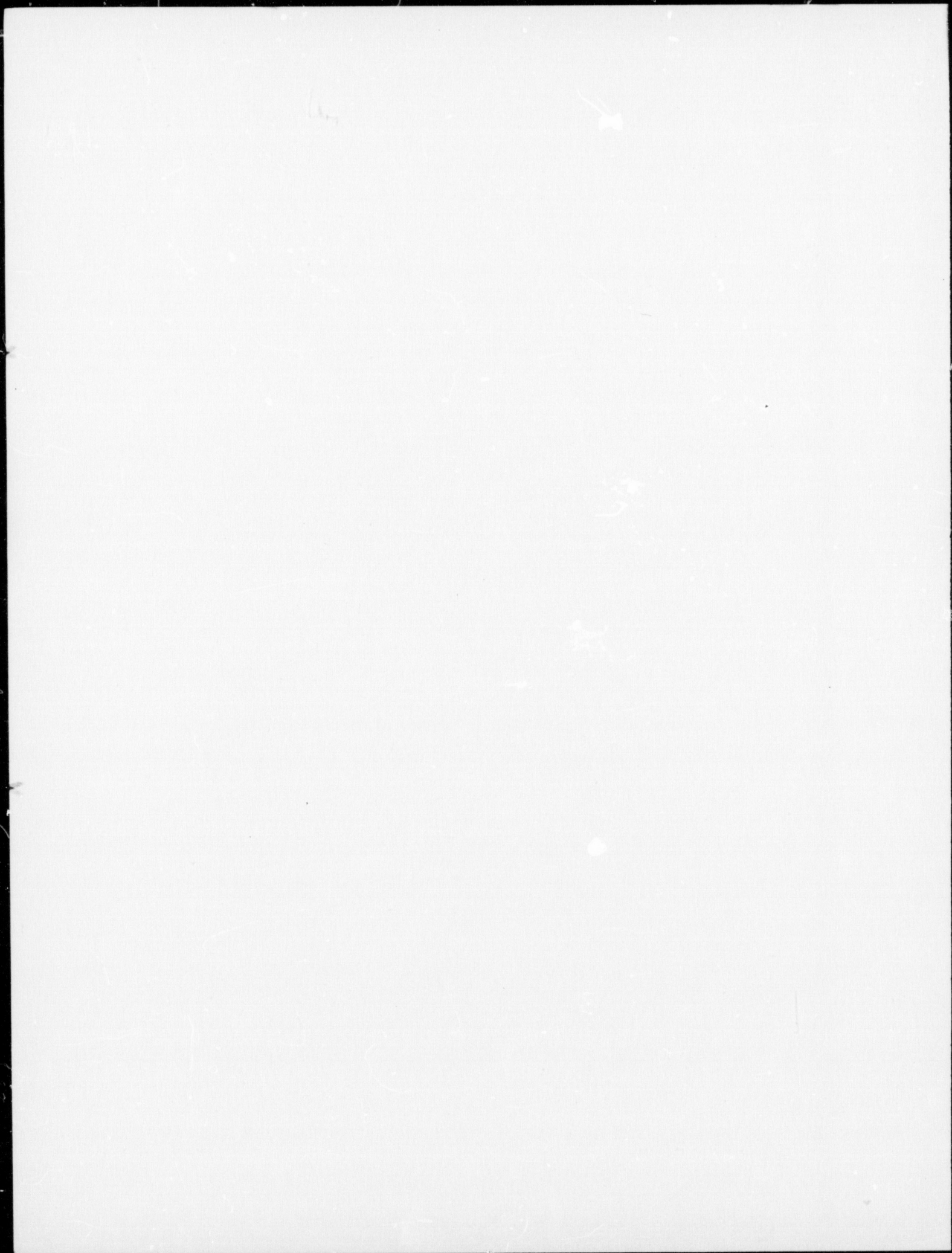
The Appellant's Motion was properly denied and the Stay of its Suit was properly continued because, if the requested relief were granted, the purpose and intent of Bankruptcy procedure would be frustrated. The Appellant would obtain a preference as against other creditors of the same class by receiving payment of its claim in full out of the Bankrupt's assets (not by payment of a third party surety out of its own assets) and the whole purpose of bankruptcy reorganization to "do equity" would be violated.

Respectfully submitted,



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Affidavit of Service

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

September 26, 1975

Re: The Matter of Stanndco Developers, Inc.

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

James B. Doyle, Esq.

Attorney(s) for

Respondent

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Francis X. Murphy, Esq.
914 Abbott Road
Buffalo, NY 14220

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 26th day of September, 1975

Ellen A. Defendis

Notary Public
Commissioner of Deeds

ELLEN A. DEFENDIS, Notary Public
State of New York, County of Monroe
Commission Expires March 30, 1977